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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77279955
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LILIANA PINEYRO VEGA,	:	SERIAL NO. 77279955
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APPLICANT.	:	
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APPLICANT'S APPEAL BRIEF

APPEAL FROM THE FINAL OFFICE ACTION OF LEIGH A. LOWRY,
TRADEMARK EXAMINING ATTORNEY, DATED JULY 16, 2008

LILIANA PINEYRO VEGA
APPLICANT

CIRCUNVALACION ORIENTE NO. 225
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STATEMENT OF QUESTIONS INVOLVED

Question I. Whether the mark “NATURE-AID HEALTH, QUALITY, TECHNOLOGY” should be allowed to register.

STATEMENT OF THE CASE

On or about September 14, 2007, the Applicant, Liliana Pineyro Vega (hereafter “Applicant”) filed a trademark application to register a trademark “NATURE-AID HEALTH, QUALITY, TECHNOLOGY.”

On or about December 19, 2007, Leigh Lowry, the Trademark Examining Attorney, issued an Office Action regarding the above trademark application. On or about June 12, 2008, Applicant responded to said Office Action.

On or about July 16, 2008, Leigh Lowry (hereafter “Trademark Examining Attorney”) issued a Final Office Action, refusing to register the above trademark.

This timely appeal followed.

ARGUMENT FOR APPLICANT

In refusing to register the trademark “NATURE-AID HEALTH, QUALITY, TECHNOLOGY” (hereafter “Applicant’s Mark”), Trademark Examining Attorney reasoned that Applicant’s Mark, if registered, would likely cause confusion, mistake, or deception.

This Board has authority to refuse to register a trademark that so resembles a registered mark as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. §

1052(d). Likelihood of confusion is a question of law, based upon underlying factual determinations. *In re Chatam Int'l, Inc.*, 380 F.3d 1340, 1342 (Fed. Cir. 2004); *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1084 (Fed. Cir. 2000).

In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973) sets out numerous factors that are relevant in determining whether there is a likelihood of confusion between competing marks:

In testing for likelihood of confusion . . . the following, when of record, must be considered: (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use. (3) The similarity or dissimilarity of established, likely-to-continue trade channels. (4) The conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing. (5) The fame of the prior mark (sales, advertising, length of use). (6) The number and nature of similar marks in use on similar goods. (7) The nature and extent of any actual confusion. (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion. (9) The variety of goods on which a mark is or is not used (house mark, 'family' mark, product mark). (10) The market interface between applicant and the owner of a prior mark. . . . (11) The extent to which applicant has a right to exclude others from use of its mark on its goods. (12) The extent of potential confusion, i.e., whether de minimis or substantial. (13) Any other established fact probative of the effect of use.

In his Final Office Action, Trademark Examining Attorney claims that the dominant portion of Applicant's Mark ("NATURE-AID") is identical in sound, connotation and commercial impression to the registered mark "NATURADE" (Registration Number 0932491). He also cites *In Re Dixie Restaurants, Inc.*, 105 F.3d 1405 (Fed. Cir. 1997) to support that the "NATURE-AID" feature of Applicant's Mark is more significant in creating a commercial impression than the rest of the mark ("HEALTH, QUALITY, TECHNOLOGY").

In *In Re Dixie Restaurants, Inc.*, the court reviewed a trademark examining attorney's refusal to register the mark "THE DELTA CAFÉ" and design for "restaurant services specializing in Southern-style cuisine because it was likely to cause confusion with the registered mark "DELTA" for hotel, motel, and restaurant services. 105 F.3d 1405.

The *Dixie* court determined that neither the design element of "THE DELTA CAFÉ" (which is an ordinary geometric shape that serves as a background for the word mark) nor the generic term "cafe" offers sufficient distinctiveness to create a different commercial impression. *Id.* At 1407.

In the instant case, Applicant's Mark consists of four (4) words "NATURE-AID HEALTH, QUALITY, TECHNOLOGY" (while the registrant's mark consists of only one (1) word "NATURADE"). Given the number of words, the likelihood of confusion in the instant case is far less than the likelihood of confusion in the *Dixie* case.

In addition, the design for Applicant's Mark is much more complex than an ordinary geometric shape serving as a background for a word mark. While Applicant's Mark comes with the sophisticated design, the registrant's trademark "NATURADE" has no design whatsoever. Thus, *In Re Dixie Restaurants, Inc.* is distinguishable from the case at bar. The design of "NATURE-AID HEALTH, QUALITY, TECHNOLOGY" certainly significantly reduces any likelihood of confusion.

Trademark Examining Attorney never analyzed the design feature of Applicant's mark. Instead, Trademark Examining Attorney insisted on giving greater weight to the dominant word feature in determining whether there is a likelihood of confusion.

Trademark Examining Attorney also claims that Applicant's goods ("NATURAL FOOD SUPPLEMENTS") are highly related to the registrant's "MEDICINAL PREPARATIONS; NAMELY, CHLOROPHYLL COMPOSITIONS, VITAMINS AND VITAMIN FORMULATIONS, MINERALS AND MINERAL FORMULATIONS, NUTRITIONAL SUPPLEMENTS, AMINO ACID TABLETS; COLD AIDS; ENERGY TONICS; LAXATIVES; DIGESTIVE ENZYMES; CONSTIPATION AIDS; EXPECTORANTS; AND DIURETICS."

Meanwhile, the products are very different. NATURADE products are available at <http://www.naturadestore.com/>. These products are weight gain/loss powders, protein powders, sports nutrition products, herbal cough and cold products, and other similar products. In other words, NATURADE products are nutritional supplements, while "NATURE-AID" products are natural food supplements. While nutritional supplements deal with nutrients, natural foods are foods that minimally processed (<http://en.wikipedia.org/>). Based on this product distinction, there is no likelihood of confusion between the above products.

In addition, NATURE-AID products are manufactured in Mexico, while NATURADE products originate in California, U.S. <http://www.naturadestore.com/> Thus, it is clear that NATURE-AID products target customers who look for Mexican natural foods, while NATURADE products target customers who look for domestic nutritional supplements. Thus, again, no likelihood of confusion exists.

Finally, Applicant notes that <http://www.naturesaide.com/legalNotices.html> advertises "NATURE'S AIDE" as a registered trademark of N.M.N. Vitamins, Inc., a Connecticut Corporation. Said website offers supplements and vitamins under the above

trademark. “NATURE’S AIDE” has been providing Americans with supplements since 1997. <http://www.naturesaide.com/>

Applicant was unable to locate the above trademark through the Trademark Electronic Search System (TESS). However, if “NATURE’S AIDE” is a registered trademark, then it was allowed to register despite “NATURE’S AIDE” being identical in sound, connotation and commercial impression to the registered mark “NATURADE.” In addition, products advertised under “NATURE’S AIDE” and “NATURADE” reveal similarity (nutritional supplements). Thus, if “NATURE’S AIDE” is a registered trademark, then it was allowed to register despite the similarity of goods. Thus, if “NATURE’S AIDE” is a registered trademark, than it would be fair to allow Applicant’s Mark to register.

CONCLUSION

The mark “NATURE-AID HEALTH, QUALITY, TECHNOLOGY” does not cause confusion, mistake, or deception. Thus, the mark should be allowed to register. Therefore, this Board should reverse the Final Office Action of July 16, 2008, and should further allow the mark to proceed.

Respectfully Submitted,

/Liliana Pineyro Vega/
LILIANA PINEYRO VEGA
APPLICANT